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SUPREME COURT

No. 411

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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

MYRTLE TWEEDY, as Administratrix of the Goods, Chattels and Credits which were of HAROLD F. TWEEDY, Deceased,

Petitioner,

—against—

THE ESSO STANDARD OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 19, 1961 (67a*) affirming a final judgment for the respondent entered by the United States District Court for the Southern District of New York after trial without a jury (Rec. 360).

Opinions Below

The Court of Appeals affirmed the final judgment for the defendant in a short unreported opinion as follows: "Per Curiam, affirmed upon the opinion of District Judge McGohey, D.C.S.D.N.Y., 190 F. Supp.

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* Numbers followed by "a" refer to the printed portions of the record in the Court of Appeals; Rec. refers to the unprinted portions of the record.

437, finding that the decedent's death did not result from any negligence of, or breach of duty owed him by, the defendant. Thus, we do not reach the further issue discussed by Judge McGohey relating to lack of proof of damages" (66a). The opinion of the District Court is reported in 190 F. Supp. 437.

Jurisdiction

The Judgment of the Court of Appeals was entered on June 19, 1961 (67a). The jurisdiction of this Court is invoked under Section 1254 of Title 28, U.S.C.A.

Statute Involved

The statute involved is the Jones Act. (46 U.S.C.A. sec. 688.)

Questions Presented

Petitioner's intestate was employed as a cook aboard the defendant's coastal Tanker Esso Potomac. He was lost overboard in Chesapeake Bay while performing his duties, alone, of dumping a 12 gallon half full garbage bucket over the side and thereafter attempting to wash the bucket in the sea, while the ship was under way. The bucket was not equipped with a lanyard or rope; the ship was not equipped with an automatic garbage grinder or disposal unit; the practice of washing the bucket in the sea was habitual and no warning or instruction against this dangerous practice was ever given; the decedent's absence was

not reported for about 10 minutes after he was last seen during which time the vessel had traversed a distance of about one mile and a half; the master did not lower the lifeboats at any time; no life rings were ever used and the ship was turned off her original course by 1000 feet in a circling search effort. The questions are:

1. On the findings of facts, the uncontradicted evidence and inferences therefrom, did not the District Court and Court of Appeals, in concluding that there was no employer negligence, fail to apply the correct liability standards under the Jones Act as formulated by this Court (*Schulz* v. *Penn. R. Co.*, 350 U.S. 523, 526; *Rogers* v. *Missouri R.R. Co.*, 352 U.S. 500, 506; *Palermo* v. *Luckenbach*, 355 U.S. 20)?

2. Was there not some employer negligence, "even the slightest", (*Rogers* v. *Missouri R.R. Co.*, *supra* at p. 506) when the employer failed to warn, instruct, or even order its cooks and the decedent against the dangerous habitual practice of bending over the ship's rail, while she was under way, to dip and wash the garbage buckets in the sea?

3. Was there not some employer negligence, "even the slightest" when the employer did not install in this ship an automatic garbage grinder or disposal unit; and did not the absence of such a machine create or aggravate, in some measure, the risks inherent in the garbage disposal and can washing procedure?

4. Was there not some employer negligence, "even the slightest" when the master failed to use time-honored good seamanship methods, under all the circumstances, to effectuate a rescue?

5. Did not the District Court err when it substituted its judgment as to what good seamanship requires a master to know and do, in the specific circumstances here, in a man overboard emergency, for that which master mariners have long observed?

Statement

The action was brought under the Jones Act by the widow of Harold F. Tweedy in her own behalf and in behalf of their son, a permanently disabled victim of cerebral palsy. The case was tried without a jury; the Trial Court, granting judgment for the defendant, concluded that Tweedy's death did not result from any negligence of, or breach of duty by, defendant. On what amounted to a demurrer to the evidence, the Court of Appeals reached the same conclusion.

The trial court made the following pertinent fact findings: (190 Fed. Supp. 438, 439).

Tweedy was 58 years old. He was the cook on defendant's twin screw diesel tanker Esso Potomac. The vessel, fully loaded, was proceeding south in Chesapeake Bay from Baltimore, Maryland, to Alexandria, Virginia. The vessel's freeboard was from 13 to 16 inches and she was making eight knots heading into a 15 mile wind with 2 feet high waves.[1]

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(1) The court concluded that the vessel "was not taking water over her decks" and that the after deck was "free of oil and grease" although Dopkowski, the only eyewitness, whose deposition was read at the trial had testified there and at the Coast Guard hearing held within 48 hours of the tragedy (63a-64a):

> "Well, I saw him go out the door to dump his bucket. After he dumped the bucket he cut in by the stanchions (indicating port quarter) and he walked this way (indicating), up the

The ship's galley was at the stern; the door facing the after deck. Just after supper, at 6:30 P.M., April 16, 1957, Dopkowski and other crew members were in the galley when Tweedy was seen by Dopkowski carrying a 12 gallon garbage bucket about half-full[2] with a removable cover, toward the rail on the port side near the stern. The rail was about 2 ft. 6 in.

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port side and when he walked this way I said to the fellow along side me 'Do you see him' and he said, 'No'. So I jumped up and rushed out. I figured he reached out to rinse the bucket, like I do once in a while too, and when I went out I didn't see him, so I rushed around the back and looked in his room and my room, and I looked in the shower room to see whether he was washing the bucket out, but I didn't see the bucket and went to the Chief's room and said 'He must have gone overboard,' because the bucket or him couldn't be found, and that was 6:12 p.m. See, generally, when it washes out there grease rolls up into balls and I figured he might have slipped and hurt himself, so when I didn't see him I figured this way: I figured, well, he might have fallen down and hurt himself, so when I rushed out and didn't see either one I figured he might have gone around this way to the shower room to wash the bucket out, but I didn't see him, so I rushed right to the Chief's room and said 'The man's gone, bucket and all.' He had a habit of dipping the bucket down and rinsing it out when he emptied the garbage. I seen him dump the garbage, but I didn't see him when he dipped the bucket."

Dopkowski had testified that there was six inches of water flooding the fantail (47a). This must have been so considering the physical facts that the vessel's freeboard was only 13 to 16 inches. The waves were 2 feet high and the ship was making 8 knots into a 15 mile wind. Why the Trial Court saw fit to disregard this testimony by deposition and the physical facts it found and accept the version of the master, who was responsible for the safety of his crew, that the deck was dry and free of oil and grease, we do not know.

(2) Dopkowski testified without contradiction, but the trial court made no finding thereon, that the bucket had no line or rope attached to it.

"Q. Well, when the people that washed the bucket by putting it over the side, did they hold onto the bucket or did they have a line or a rope? A. Hold onto the bucket.

Q. There was no line? A. No line." (62a-63a

high and the top was 5 in. wide. Tweedy was about 5 ft. 2 in. tall and weighed between 200 and 225 pounds. Tweedy emptied the bucket over the side and was last seen moving forward along the port rail by Dopkowski. When after a few minutes Tweedy did not return, Dopkowski commenced a search of the ship and then notified the master (190 Fed. Supp. p. 439; footnote p. 5 supra). It was then 6:42 P.M., about 12 minutes after Tweedy had left the galley to dump the garbage and about 10 minutes after Dopkowski had last seen him. The ship was then at least a mile and a half south of her position when Tweedy was last seen. The master was on the bridge. He ordered a hard left turn "in order to swing the propeller" away from the port side where Tweedy was last seen and *put the ship about to set a course to "backtrack"*[3] "over the area the vessel had traveled since 6:30" P.M. The master also ordered a search of the vessel, turned on the floodlights and searchlights, called the Coast Guard, stationed lookouts on top of the fore and aft houses and life rings were readied to be thrown over if Tweedy was sighted. Tweedy was sighted by Dopkowski and Krause "floating face down with arms outstretched", though they differed on distances and no one else "was able to see" what they said they saw (190 Fed. Supp. 439). The master, accepting Krause's and Dopkowski's word for what they saw, turned the vessel sharply (again going off course and away from the object sighted, this time by 130 feet

(3) Here the trial court distorted the master's own testimony and left the Appellate Court with the wrong impression on a crucial issue of negligence stemming from incompetent seamanship, as we later point out (infra, pp. 19-20). The master testified that he executed a "U" turn to his left, admitting that he deviated from his course by about 1000 feet (54a).

(59a) (footnote infra, p. 8). The vessel continued to "sweep the area" but at no time during the search was a single lifeboat lowered though the ship had two, and no life rings were ever thrown even when Tweedy was allegedly sighted; the trial court finding that Krause and Dopkowski did not see what they informed the master they did see. Everyone aboard was wearing a life jacket and the trial court stated that the men were "detailed", if Tweedy was sighted, to go with the master into the water to rescue Tweedy.(4)

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(4) The word "detailed" is misleading and does not, again, comport with the evidence. To "detail", in military parlance, means to tell off or appoint for some special service (Webster's Collegiate dictionary 5th Ed.); really, to order a special job done. The master did not detail anyone to jump into the water. He testified: (59a)

Q. Did you throw any life jacket into the sea? A. No.

Q. Did you order any thrown into the sea? A. No.

Q. Did you throw any life buoy or life ring into the sea? A. No.

Q. Did you order any thrown in? (98) A. No.

Q. Did you order any man to jump in if he saw Tweedy in the water? A. I didn't order anyone. I said I would do it, and the other men did this likewise.

Q. But you gave no instructions to anybody to jump in if they saw the man, did you? A. No.

Q. The man was seen within 50 feet of that vessel at one of the runs, wasn't he? A. No.

Q. Was it reported to you that he was seen? A. Someone said they saw him, but they didn't say where.

Q. Did anyone report to you that he was seen within 50 feet of the vessel? A. They didn't report the distance.

Q. But they reported to you they saw the man? A. I gathered the information that they did——

Q. At the time when you got the word that they saw the man in the water, did you stop the vessel? A. I swung right around and went to that spot.

Q. Did you stop it? A. It was running at slow speed.

(99)

The Court: The question is: You didn't stop it?

The Witness: No, sir.

Q. How much of a swing did you make, a complete U-

Concededly the vessel was not equipped with an automatic garbage disposal unit. The uncontradicted testimony of the defendant's own expert, Pavlik (60a, 61a) was that it would cost to install, in the Esso Potomac, (including the cost of the unit) a garbage disposal grinder, $2,000—$2,500, and the ship was worth about a million dollars. Notwithstanding this evidence, the trial court concluded that "only with some difficulty and substantial expense could such a unit be installed in the ship". He found, correctly, that "no tankers of *her size* are, or ever have been" equipped with garbage grinders although the uncontradicted evidence reveals that this ship had a complement of 11 men requiring three meals a day and snacks (53a).

The trial court, refusing to face the issue as to whether the ship should not have been equipped with an automatic garbage grinder (190 Fed. Supp. 439, 440), concluded that, in any event "the absence of such a unit had no causal relation to Tweedy's death; that it was *his own gross negligence* which produced that result if he fell or was pulled into the water while attempting to wash the bucket by dipping it into the bay. The trial court went on to say that *Tweedy was not required to expose himself to the danger inherent in attempting to wash the bucket in*

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swing? A. No, I backed one engine coming on the other, and she turned half the length.

Q. That would be how many feet of the diameter of the arc? A. Roughly 130 feet.

Q. So that turn would take you 130 feet away from where the man said they sighted the man in the water? A. Probably would, yes, sir.

the sea by any rule or order(5) and that he could have washed the bucket in the washroom. The trial court could have found, because the evidence is undisputed, that this dangerous practice of washing buckets in the sea, was habitual, indulged in by other cooks as well as Tweedy and even Dopkowski (61a, 62a); that no instructions against the practice were given except by Dopkowski, a pumpman, to one cook after the Tweedy tragedy (62a) and the master assumed the practice was going on but did not concern himself therewith (29a, 30a).

Reasons for Granting the Writ

1. The true administration of justice is supposed to be the firmest pillar of good government. But when some trial, and even intermediate appellate, courts rationalize an obviously preconceived notion of what the law ought to be in a given case, in disregard of the plain mandates repeatedly given by this court of what the law is, the firmest pillar begins to shake and justice is in grave danger of being buried under an avalanche of chaotic individual ideas of sound legal principles applicable to specific cases. This case is a classic example of a miscarriage of justice by a trial court who took nearly eight months to rationalize his conclusion that there was absolutely no negligence or breach of duty on the part of the employer (because Tweedy was foolish enough to attempt to wash his bucket in the sea) in plain disregard of the standard of liability laid down by this court in cases arising under the Jones Act.

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(5) This illustrates the speciousness which permeates the trial court's opinion and demonstrates the mental attitude of some trial judges, at war with settled principles. If Tweedy was a fool, it does not follow that the employer was not also, in some measure at fault (infra, p. 10).

This court formulated and repeatedly affirmed that the correct liability standard in these cases is that "petitioner is entitled to recover if her husband's death resulted 'in whole or *in part*' from defendant's negligence". (*Schulz* v. *Penn. R. Co.*, 350 U.S. 523, 526). And fair minded triers of fact must search the record evidence and draw the fair inferences of fact therefrom; and if employer negligence did play a part "even the slightest", liability must be concluded; contributory negligence, absorbing the doctrine of assumption of risk, merely mitigating the damages (*Rogers* v. *Missouri R.R. Co.*, 352 U.S. 500, 506; *Palermo* v. *Luckenbach*, 355 U.S. 20; *Socony* v. *Smith*, 305 U.S. 424, 428).

The trial court disregarded these well settled rules to sustain the fixed notion that it was Tweedy's sole fault for dying by drowning. Having no jury to charge, he should have charged himself with these rules in the light of the record evidence in this case (see *Romero* v. *Garcia*, 286 F. 2nd 347, 355, 356); evidence developed almost entirely out of the mouths of the defendant's own witnesses and virtually free of conflict on really material issues. The issue of employer negligence, even the slightest, was, therefore, one of law on this record. We submit that this trial court literally went out of its way, as we pointed out in the statement of facts and footnotes thereto (supra pp. 4-9) to distort the record evidence, disregard physical facts, characterize evidence improperly, substitute his judgment of what good seamanship requires in a man overboard emergency bolstered by opinion testimony of a master seeking to exculpate himself from blame for the death of one of his men, without even attempting to consult the leading manual which

guides master mariners in such emergencies, Knight's Seamanship 10th Ed., Chap. XVII, pp. 590-593. Had he consulted Knight's book he would have realized that the master was completely ignorant of what he was required to know and do under the circumstances he was confronted with. The Court of Appeals, apparently, paid no attention to this feature of the case too, though the subject of rescue duty and methods was briefed rather thoroughly. The trial court did not seek briefs.

2. The employer was guilty of some negligence in this case:

A. The Failure to Warn, Instruct or Issue an Order Against Washing Garbage Buckets in the Sea and Not Providing the Bucket Handle With a Rope or Lanyard.

The evidence, and the findings, justify the inference that Tweedy met his death while attempting to wash a garbage bucket by leaning over the rail and dipping the bucket in the sea while the ship was under way at 8 knots into a 15 mile wind. This was the only inference that could be drawn by any reasonable minded person on the observations of the witness Dopkowski who drew this inference himself at the Coast Guard hearing held within 48 hours of the tragedy (63a). In the first place, as the trial court has found (190 Fed. Supp. 440), this method was inherently dangerous. This being so, why then did the Court not conclude that Tweedy's accident resulted from this hazard of his employment? The answer given by the Court in his opinion (190 Fed. Supp. 440) is that Tweedy need not have incurred this risk because he could have

safely washed out the garbage bucket in the washroom. The evidence is undisputed that this careless method of cleaning the bucket had been indulged in not only by Tweedy, but by other cooks and Dopkowski as well (61a, 62a). No instructions against this dangerous practice were given except by Dopkowski[6] to one cook after the Tweedy tragedy (62a). The master assumed the practice was going on but did not concern himself therewith (29a, 30a). The patent unsuitability of washing greasy, slimy garbage containers in a washroom may explain in some measure why the cooks frequently resorted to the dangerous alternative of washing their buckets in the sea. Nor does it matter that a safer alternative was available because, as this Court has emphasized, such alternative does not eliminate the presence of the alluring dangerous alternative. Human nature being what it is, and the

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(6) Here no warning was ever given Tweedy or the other cooks before the tragedy not to wash the bucket in the sea. But even if such a warning had been given, it would not have met the standard of care required because the degree of danger was so great that nothing short of a master's order forbidding the practice would have sufficed. Compare the following statement from Judge Clark's opinion in *Parsons* (246 F. 2d 557, at pages 562-563):

> "The charge is further quite objectionable in its assumption that the defendant could in no event owe any higher duty to the plaintiff than to warn him of the danger in the port passageway. The majority cite the concurring opinion in Lynch v. United, 2 Cir., 163 F. 2d 97, 99, for the proposition that it may be negligent not to warn of the dangerous passage; but neither that case nor any other case cited to us holds that the duty of reasonable care is always satisfied by a mere warning. Often, where the continued presence of the peril serves no important useful purpose to the defendant and the cost of removing the peril is small, a reasonable man will remove the danger, and not just warn of it. This is a perfect example of such a situation: How simple it would have been to replace the burned-out light bulbs, wipe up the grease, and prevent this accident!"

statute condemning employer negligence in whole or in part, however slight in degree, requires the trial court to recognize the hazard as playing a part in causing the tragedy. See *Palermo* v. *Luckenbach*, 355 U.S. 20.

The findings of the trial court underscore the negligence of the employer in not having *forbidden* its employees to resort to this dangerous expedient, or in not furnishing an appliance which would lessen the risk. Indeed, if any case presents a classic example of foreseeability of the extreme danger to which Tweedy, and his co-workers were exposed, it is this case. As the court below has found: The vessel was so fully laden that she had only about 13 to 16 inches of freeboard at her stern; she was moving at 8 knots against a 15 mile wind; the waves were 2 feet high; Tweedy had to hoist and dump a 12 gallon, half-full bucket, with a handle, to which no rope or lanyard was attached (62a, 63a). He, therefore, had to bend over the 2 foot 6 inch rail in order to dip the bucket in the sea. Even a tall, young fellow would experience a tug in such a situation that could easily yank him overboard. Tweedy was 58 years old, short and fat. The evidence being uncontradicted that this dangerous practice went on for a period of time before and after Tweedy's death (61a, 62a), how can one fail to conclude that the master was not remiss in tolerating its continued indulgence. *A fortiori:* would this follow when, as here, the wind, sea, speed and deep draft of the ship aggravated the hazard.

B. The Absence of an Automatic Garbage Grinder.

The absence of an automatic garbage disposal unit rendered the vessel unseaworthy and constituted employer failure to provide a safe place to work. The

court below found that "it is possible, though only with some difficulty and substantial expense, to install such a unit on the Esso POTOMAC." The evidence given by the appellee's witness, Frank L. Pavlik, was that it would cost between $2,000.00-$2,500.00, including the cost of the unit, to install one in this ship and that the ship was worth at least a million dollars (60a-61a). Realizing that, in this day and age of automation, the fact that no tankers of the size of the Esso POTOMAC were equipped with automatic garbage grinders is "not necessarily conclusive" to a determination of a standard of care holding the employer at fault for failure to provide such a unit, the court below, refusing to apply such a standard, went on to conclude that "in any event" the absence of the unit had no *causal relation* to the decedent's death because the decedent had disposed of the garbage without injury and (speculating correctly on the evidence, as did Dopkowski before the Coast Guard, supra p. 5) either "fell or was pulled into the water while attempting to wash the bucket". The court then concluded "that it was his own gross negligence which produced that result" (190 Fed. Supp. 440).

How simple it would have been to have issued a company rule not to wash buckets in the sea; or else invest $2,500.00 in a garbage grinder in this one million dollar Tanker!

If the test, in these cases, is whether employer negligence played any part, even the slightest, in the decedent's falling or being pulled overboard, then how can it be urged that the absence of an automatic garbage grinder could not have some "causal relation", (to use the trial court's language); could not

have contributed in even a slight degree, to the decedent's going overboard. (See the language of Judge Hand in *Zinnel* v. *U. S. Shipping Board*, 10 F. 2nd 47, 49). Such a unit would have rendered a 12 gallon garbage can unnecessary to begin with; there would have been no necessity for either dumping the load of such a can over the side or of subsequently washing out the residue either in the sea or in the washroom where garbage residue would, likely, adversely affect the washroom facility from a standpoint of odor, health, or mechanical efficiency.

If the trial court's conclusion of no "causal relation" was meant to convey the idea of lack of proximate cause, he was grossly in error under the foregoing authorities. Whether "employer negligence played some part" in the decedent's going overboard because of the absence of an automatic garbage disposal unit, or because Tweedy was permitted to indulge in an inherently dangerous practice of washing the can over the side, is a question of common sense in these cases, not of technical "legal causation". The Court's conclusion that it was the decedent's own gross negligence that caused him to go overboard because he could have washed the bucket in the washroom flies in the face of the common-sense standard applied by this Court in the cases cited supra p. 10 and of the holding in *Palermo* v. *Luckenbach*, 355 U.S. 20, 2 L. Ed. 2d 3; and see *Socony* v. *Smith*, 305 U.S. 424 at p. 428 and pp. 431, 432.

The concurring opinion of Judge Frank in the *Poignant* case (255 F. 2d 595, pp. 600-601) is persuasive of what the rule is, in reasonably equipping a

vessel. It is not what is generally provided aboard comparable ships, but what ought to be done as a standard of reasonable prudence. That these automatic garbage grinders were being installed and came into general use around the year 1945, (true, in larger vessels than the Esso POTOMAC), is not disputed (36a). But, as Judge Frank noted, what is not generally done on a smaller vessel is not the test of reasonable fitness under the *T. J. Hooper* doctrine (60 F. 2d 737, 739) when the safety of the crew is involved.

As a matter of common sense, preparing 33 meals and snacks a day on this 11 man ship (53a, 25a) by a single man is quite a job and generates a lot of garbage. Furthermore, neither Dopkowski nor any of his other fellow crew members offered or were even ordered to assist Tweedy in disposing of garbage; and precious minutes passed while these men gossiped in the galley; and precious more minutes passed before Dopkowski aroused himself to Tweedy's non-return, searching the ship before notifying the master. It was suggested by appellee (Brief, Court of Appeals, p. 5) that automatic garbage grinders do not dispose of large bones, tin cans and crates. True, but large bones, tin cans and crates can be tossed overboard, together with a disposable container (39a) thereby eliminating buckets that need washing.

C. The Master Was Under a Duty to Rescue Tweedy; He Was Grossly Incompetent in His Rescue Efforts; He Did Precisely the Opposite of What Good Seamanship Required of Him.

Mr. Justice Cardozo, in a dictum in *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, p. 377, said:

> "There is little doubt that rescue is a duty when a sailor falls into the sea. United States v. Knowles (D.C.) 4 Sawy. 517, Fed. Cas. No. 15,540, and that a liability to respond in damages is cast upon the shipowners if he is abandoned to his fate. Harris v. Pennsylvania R. Co. (C.C.A. 4th) 50 F. (2d) 866, supra."

Beyond this statement of duty, our research discloses no case in which this court has expressed its views on the subject of negligence in rescue cases other than to deny certiorari, as it did, in *Macomber's Case* 1942 A.M.C. 41, reversed by the Supreme Court of Louisiana 1942 A.M.C. 816, Cert. den. 87 Law Ed. 532.

Lower courts, trial and appellate, Federal and State, have variously stated what is required in carrying out the duty to rescue. Thus, the New York Appellate Division, Second Department, in *Marczinak* v. *J. B. King Transp. Co.* (170 A.D. 56; 155 N.Y.S. 608, 609) said:

> "It was the duty of defendant's captain, when informed that plaintiff was overboard, to use reasonable care, not only to prevent further injury, but to rescue the unfortunate man, if it could be done by the exercise of the care and prudence of a reasonably careful pilot placed in his position at the time."

The New York Court of Appeals in *Raolaslovic* v. *New York Cent. R. Co.*, (245 N.Y. 95; 156 N.E. 625) went one step further and held that:

> "It was not enough that he (the master) should 'act prudently, in view of the knowledge which he actually had. He is responsible for his ignorance of that which he ought to have known'. Shearman & Redfield (5th Ed.) sec. 87."

And in *Trans-Pacific Fishing Co.*, 152 F. Supp. 44, the District Court, Western District of Washington said:

> "It is the duty of every shipowner and ship operator to use *every possible available means to rescue* from the sea any and all persons and members of its crew who may be unfortunately washed overboard. In this instance the skipper and all those aboard at the time and the owner failed and neglected to do that." * * *

In *Macomber's Case* (supra p. 17), the Supreme Court of Louisiana, when reviewing virtually all the man overboard cases, distinguished *Johnson* v. *U. S.* 74 F. 2d 703), as did the court in *Tompkins* v. *Pilots Ass'n.* (32 F. Supp. 439, 441), because there the master was indeed confronted with a choice between two *different incompatible* methods of rescue, and said (*Macomber's Case*, at p. 822, 1942 A.M.C.):

> "Moreover, the law does not leave any discretion to the officers and crew of a boat in cases of such emergency."

We respectfully submit that the master did not use every possible available means to effect rescue, and

the shipowner breached its contractual duty to Tweedy in that regard.

Admittedly, the master could, on learning that Tweedy was overboard, have lowered the lifeboats in a matter of seconds (58a). Yet he did not take this elementary, time-honored precaution. Furthermore, he could have pursued the measures he adopted *in addition* to lowering the lifeboats. He was not "confronted with a choice between two different *incompatible* methods of rescue". (*Tompkins* v. *Pilots Ass'n.*, 32 F. Supp. 439, 441). He was manifestly himself aware of this unfortunate omission because when he was first asked why he did not lower the lifeboats, he said, "the sea was too rough" (56a). At the trial he abandoned this explanation and, contradicting his earlier testimony, denied that the sea was too rough for lowering the lifeboats (58a). This time he said that the methods he used to effect rescue were superior to lowering the boats (26a-27a). But his belated explanation indicates the self-exculpatory character of his testimony, because it was not a mutually exclusive choice between two courses of action; he could, and should, have done both. Who is to say that Tweedy might not have been saved had he lowered the lifeboats? Saving a man overboard is not a guessing game as to what measures are best. All must be adopted.

It is important to note that the master could have lowered the lifeboats in the very track that the vessel had traversed, whereas in executing a "U" turn to his left, he admitted that he deviated from his track by about 1,000 feet (54a); and see the turning circle of a 250′ ship; 318 yards (Knight's Seamanship, p. 295). This fact underscores the distortion by the trial

court in saying that he "backtracked." The fact is that the vessel made a series of "sweeps" in the general area of her former course, but this is a far cry from saying that she retraced her course. She could easily have been hundreds of yards off that course, whereas the lifeboats would have been able to far more easily "backtrack" a mile and a half on the former course.

The trial court said: "Plaintiff offered no testimony as to what good practice required under the existing conditions" (190 F. Supp. 440). He then stated that the master's procedures were better than lowering lifeboats[7] and substituted his judgment of good seamanship for that recognized by all master mariners and, indeed the Courts. See *U. S. v. Knowles*, supra, p. 17, cited by Mr. Justice Cardozo, where Judge Field said, among other things, that the master "is bound, both by law and by contract, to do everything * * * necessary to rescue the person overboard and, for that purpose *to stop the vessel, lower the boats* * * *" (26 Fed. Cas. 801, 802).

This duty to rescue and to do everything necessary to effectuate a rescue is so mandatory that contributory negligence is no defense to its breach (*Harris v. Penn R. Co.*, 50 F2nd 866, 868, cited by Mr. Justice Cardozo in *Cortes*, supra, p. 17 and it matters not whose fault it was that the sailor went overboard to begin with (*Kirincich v. Standard Dredging Co.*, 112 F2nd 163, 164).

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(7) The master testified his ship was very maneuverable and the trial court accepted this as an excuse for not stopping and lowering the lifeboats. But the fact remains that the ship was so deeply laden that she had only 13-16 inches of freeboard.

The lifeboats were not lowered at any time; the life rings were never used, even when Dopkowski and Harris informed the master that they spotted Tweedy; and it may be inferred from the absence of testimony thereon by the master that no "marker" of any kind was thrown astern in the ship's track (if this ship was equipped with a suitable marker). This court may observe that there are difficulties attendant on producing expert shipmasters to testify as to what "good practice" requires in a man overboard situation, just as there are difficulties in persuading doctors to testify in a malpractice case. But Knight's Seamanship (Chapter XVII, p. 590-593 10th Ed.) may be referred to as a guide to what a master should know and do as a matter of good practice. To turn the ship's screws away from the side of the ship when a man goes overboard is good practice only when knowledge that the man is overboard occurs virtually at once with the fact. (See *Macomber's Case*, supra, p. 17, at p. 825.) Since Tweedy was then overboard about a mile and half astern of his ship, the master blundered by turning the ship to port and thus getting off his original course by 1000 feet. When a man overboard is clear of the screws, Knight instructs (Knight's Seamanship, p. 591-593) what is good practice under circumstances such as here existed, especially since the ship's *heading* was both into a 15 mile wind and the tide: (190 F. Supp. 438, 29a).

> "Under ordinary circumstances the engines are thrown *to full speed astern as soon as the man is clear of the screw, and a boat is lowered as soon as the speed has been reduced sufficiently. The boat pulls back in search of the man*, guided by signals from the lookouts aloft, provided they

have succeeded in keeping the man or the buoy in sight. Failing this, *the boat cannot go far wrong if it pulls back on a course opposite the original heading of the ship;* for, although the steamer in backing will probably throw her head to one side, she will not usually gain a great amount of ground in that direction before coming to rest. In most conditions of the sea, a boat may be lowered with reasonable safety at a speed of five knots; and we may assume that the distance required to reduce the speed to this will be from two to four ship's lengths, and the time, from two to four minutes.

* * * *

Without attempting to lay down rules for the endless variety of situations which may arise in a matter of this kind, it will perhaps not be going too far to say that, *generally speaking, the ship should be stopped and backed if she has the wind and sea ahead.*" (Italics ours.)

Under the physical facts and circumstance here the master should have stopped the ship, lowered the life boats with instructions to pull back on a course opposite the original heading and then backed his own ship in the same course since he had the wind and sea ahead.

Further, by this time night was falling, and a man in a lifeboat would have had a far better opportunity of scanning his immediate area at water surface level than a lookout perched on the fore and aft houses of the tanker, with the searchlights and floodlights playing on the water in the ship's original course, and if

Tweedy was sighted could far more quickly have rendered effective aid. Again, as Knight (p. 592-593) says:

> "If the conditions are such—due to the lack of a proper marker, or to fog, or to any other cause—that difficulty is to be anticipated in finding the man, *it is probably better to stop and send the boat back along the course opposite the original heading.* This emphasizes the importance of having a compass in the boat." (Italics ours.)

Indeed, who can say whether Dopkowski and Krause were not correct in their testimony that they saw Tweedy in the water? If they were in a lifeboat, they could have come to his aid. But on reporting their discovery, the master again turned the ship around, this time 130 feet away (supra footnote p. 8) from the place of discovery and again failed to lower a single lifeboat. Can it fairly be said that the master did everything possible; that he used every available means to effectuate a rescue? Indeed, can it not be said, rather, that the master was wholly incompetent in this emergency.

3. We do not reach the issue of damages as did not the Court of Appeals. Had the Court of Appeals reversed the trial court on the issues of negligence, we believe that it would also have reversed that court's disposition of the Court of Appeals own ruling in *Civil* v. *Waterman* (217 F. 2nd 94). The trial court's attempt to distinguish *Civil* v. *Waterman* is plainly as specious as we believe his reasoning to be on the issues heretofore discussed.

CONCLUSION

For these reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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